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March 14, 2023

**Via ECF**

Honorable Magistrate Lois Bloom  
United States District Court  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, NY 11201

Re: *Phhhoto Inc. v. Meta Platforms, Inc., et al.*, No. 21-cv-06159-KAM-RLM

Dear Chief Magistrate Judge Bloom:

Pursuant to Federal Rule of Civil Procedure 26(c), Defendant Meta Platforms, Inc. (“Meta”), by and through its attorneys, respectfully moves to stay discovery pending the Court’s resolution of Meta’s motion to dismiss the amended complaint of Plaintiff Phhhoto Inc. (“Phhhoto”). *See* ECF No. 27. This case satisfies the criteria for a stay of discovery: Meta’s motion to dismiss identifies serious defects with each of Phhhoto’s claims, discovery will be costly and time-consuming, and a stay will not unfairly prejudice Phhhoto.

**Background.** Phhhoto, a defunct photo-sharing application, filed this lawsuit in November 2021, based on conduct that allegedly occurred between 2015 and 2016. ECF No. 1. Phhhoto alleges that in 2016, Instagram implemented an algorithm to determine what content Instagram users would see in their feed, replacing the prior chronological feed. Phhhoto complains that the algorithm caused engagement with Phhhoto content on Instagram to “tank,” and led to the company’s demise by mid-2017. Based on this and other, earlier conduct, Phhhoto sued Meta under the Sherman Act and state common law, claiming monopolization, fraud, and unfair competition.

Meta sought leave to file a motion to dismiss Phhhoto’s claims. ECF No. 16. At a pre-motion conference held on March 10, 2022, Judge Matsumoto observed that Phhhoto’s antitrust claim was likely time-barred because it is subject to a four-year statute of limitations, but “it appears this case was filed five years after the alleged violations.” 3/10/2022 Conf. Tr. 3:9-11. The Court granted Phhhoto leave to amend its complaint to try to “address some of the deficiencies that [Meta] raise[d].” *Id.* at 6:23-7:5. After Phhhoto amended its complaint (ECF No. 22), Meta moved to dismiss, arguing Phhhoto’s claims are barred by the applicable statute of

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limitations and that Phhphoto failed to state any claim upon which relief can be granted. ECF No. 27-1. The motion was fully briefed on June 6, 2022. ECF No. 29.

On December 13, 2022 – more than a year after filing this lawsuit – Phhphoto raised with Meta the possibility of commencing discovery. Meta explained that it would be inefficient and burdensome to proceed to discovery before the Court ruled on Meta’s motion to dismiss. On February 21, 2023, Phhphoto stated its intention to begin discovery. At Phhphoto’s request, the parties held a Rule 26(f) conference on March 13, 2023, during which Meta notified Phhphoto of its intent to move to stay discovery.

**Argument.** Under Rule 26(c), “a district court may stay discovery during the pendency of a motion to dismiss for ‘good cause shown.’” *Chesney v. Valley Stream Union Free Sch. Dist. No. 24*, 236 F.R.D. 113, 115 (E.D.N.Y. 2006) (issuing stay). When evaluating whether good cause exists, courts consider “(1) whether the defendant has made a strong showing that the plaintiff’s claim is unmeritorious; (2) the breadth of discovery and the burden of responding to it; and (3) the risk of unfair prejudice to the party opposing the stay.” *Id.* Each factor favors a stay.

***Meta’s motion to dismiss is potentially dispositive.*** Staying discovery is appropriate when a pending motion to dismiss “is potentially dispositive” and “not unfounded in the law.” *Elnenaey v. JP Morgan Chase Bank, N.A.*, 2021 WL 7908626, at \*1 (E.D.N.Y. Oct. 7, 2021) (Bloom, MJ); *see Port Dock & Stone Corp. v. Oldcaster Ne., Inc.*, 2006 WL 897996, at \*2 (E.D.N.Y. Mar. 31, 2006) (staying discovery in antitrust case because defendants’ dismissal “arguments do not appear to be frivolous or unfounded”). That low bar is met here. As detailed further in Meta’s motion to dismiss, Phhphoto’s claims are untimely and legally deficient. Phhphoto’s federal antitrust claim is subject to a four-year limitations period. ECF No. 27-1 at 7-8. So too is Phhphoto’s New York common-law fraud claim, as it is incidental to the antitrust claim. *See id.* at 16-17. Phhphoto’s New York unfair competition claim is subject to a three-year limitations period. *See id.* at 15-16. These claims accrued, if at all, no later than April 2016, when the last alleged act – Instagram’s adoption of an algorithmic newsfeed – supposedly injured Phhphoto. Consequently, Phhphoto’s claims all expired by April 2020 – more than a year before it sued. Other federal courts have dismissed as time-barred complaints based on some of the same alleged conduct, and this case is no different. *See id.* at 8 (collecting cases).

Phhphoto’s claims also fail as a matter of law. Phhphoto’s antitrust claim fails because its theory of harm – that Meta failed to promote Phhphoto on Facebook and Instagram – is foreclosed by controlling precedent, which recognizes that Section 2 of the Sherman Act generally imposes “no duty to aid competitors.” *Verizon Commc’ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004); *see* ECF No. 27-1 at 17-23. Phhphoto’s fraud claim fails because it does not allege any false statements that Phhphoto relied on to its detriment. ECF No. 27-1 at 27-29. And its unfair competition claim fails because Phhphoto does not allege any misappropriation. *See id.* at 29-30. The Court should rule on these substantial, case-dispositive arguments before discovery begins.

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***Discovery would unnecessarily burden Meta.*** The Supreme Court has cautioned against rushing to discovery in antitrust cases given the “unusually high cost” and “extensive scope” of such cases. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007). For those reasons, courts routinely stay discovery pending the resolution of motions to dismiss in antitrust actions. *See, e.g., Spinelli v. Nat’l Football League*, 2015 WL 7302266, at \*3 (S.D.N.Y. Nov. 17, 2015); *In re Term Commodities Cotton Futures Litig.*, 2013 WL 1907738, at \*7 (S.D.N.Y. May 8, 2013); *Integrated Sys. & Power, Inc. v. Honeywell Int’l, Inc.*, 2009 WL 2777076, at \*1 (S.D.N.Y. Sept. 1, 2009); *Port Dock & Stone*, 2006 WL 897996, at \*2; *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1996 WL 101277, at \*1 (S.D.N.Y. Mar. 7, 1996). The Court should do the same here. Phhphoto’s 222-paragraph amended complaint challenges a hodgepodge of conduct that occurred more than five years ago. Discovery into these stale events will necessarily be costly and time-consuming. Phhphoto has proposed that (as a first step) Meta hand over discovery it has produced in another case, but because that case involves unrelated conduct and a much broader time period, Meta would have to re-review millions of pages of documents for their relevance to this case – a very costly and burdensome process. None of this discovery, however, will be necessary if the Court grants Meta’s motion to dismiss.

***Staying discovery will not unfairly prejudice Phhphoto.*** Phhphoto will suffer no unfair prejudice if discovery is temporarily stayed while the Court considers Meta’s motion to dismiss. Phhphoto waited more than four years after the alleged conduct to sue and made no effort to initiate discovery until a year after filing its amended complaint. Having taken its time, Phhphoto cannot show a compelling need for immediate discovery. Regardless, “[a] stay pending determination of a dispositive motion that potentially eliminates the entire action will neither substantially nor unduly delay the action, should it continue.” *Spinelli*, 2015 WL 7302266, at \*2. Staying discovery also “would not disrupt the progress of ongoing discovery,” because Phhphoto has not served any discovery demands on Meta. *Contracto Ltd. v. Fast Search & Transfer Int’l, AS*, 2012 WL 12252587, at \*2 (E.D.N.Y. July 12, 2012). And because the alleged conduct occurred years ago, granting a short stay will not affect what witnesses remember. *See Commodities Cotton*, 2013 WL 1907738, at \*7 (fading memories “affect all the parties equally” and so do not establish unfair prejudice). Phhphoto therefore cannot establish a stay will result in unfair prejudice. *See id.* (staying discovery where “plaintiffs failed to demonstrate that a short delay in discovery will impose any unfair prejudice on them”).

The Court should stay discovery pending the resolution of Meta’s motion to dismiss.

Respectfully submitted,

/s/ Aaron M. Panner  
Aaron M. Panner

cc: Counsel of record (via ECF)